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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WILLIAM SIMPSON,

Plaintiff and Respondent,

v.

CAMERIC INTERNATIONAL
DEVELOPMENTS, FOMBE
NDIFORCHU, CASSANDRA
NDIFORCHU, et al.,

Defendants and Appellants.

B200073

(Los Angeles County
Super. Ct. No. TC019429)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rose Hom, Judge. Affirmed.

Odiase Law Group, Charles Uwa Odiase; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Defendants and Appellants.

Law Offices of John R. Blanchard and John R. Blanchard for Plaintiff and Respondent.

William Simpson, M.D. sued his former landlords for damages for breach of a commercial lease. A jury assessed \$1,344,184 in damages against Cameric International Developments, Fombe Ndiforchu, Cassandra Ndiforchu, and the Ndiforchus as co-trustees of the Ndiforchu Family Trust (collectively Cameric). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Orthopedic surgeon Simpson entered into a commercial rental contract with Cameric for use of medical office space. When a dispute arose over a new proposed lease and other matters, Cameric turned off the electricity to Simpson's office suite for approximately one month. Simpson sued.

After a jury trial, the jury concluded that Cameric had breached the rental contract, causing harm to Simpson, and that Cameric intentionally disrupted Simpson's economic relationships with his patients by wrongfully discontinuing electrical power to Simpson's suite. The jury awarded Simpson past lost profits of \$1,090,684 and future lost profits of \$253,500. Although the jury found that Cameric acted with malice, oppression, or fraud, the jury declined to impose punitive damages.

Camic moved for a new trial and for judgment notwithstanding the verdict. The trial court denied both motions. Cameric appeals.

DISCUSSION

I. Cassandra Ndiforchu

The parties dispute whether Cassandra Ndiforchu is a party to the appeal in her individual capacity. The first notice of appeal, filed on May 31, 2007, included Cassandra Ndiforchu as co-trustee of the Ndiforchu Family Trust. On June 25, 2007, Cameric filed an amended notice of appeal including Cassandra Ndiforchu in her personal capacity as well as the other defendants. These dual documents were treated as

separate appeals within the same case number. Subsequent difficulties in the appellate process culminated in the dismissal of both the appeals; only the earlier appeal was ultimately reinstated. Simpson contends that Cassandra Ndiforchu cannot be considered to have been inadvertently omitted from the original filing in light of the later failure to secure reinstatement of the appeal naming her as an appellant in her personal capacity.

“The general rule is that although failure to file a notice of appeal is a jurisdictional defect that cannot be remedied, once a notice is filed it is to be construed liberally in favor of its sufficiency.” (*Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 714; see also Cal. Rules of Court, rule 8.100(a)(2).) “[N]otices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.” (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) Here, although we recognize that the “second” appeal was dismissed and a remittitur issued on that matter, in light of the convoluted course of the appeal, the failure of Simpson to allege any prejudice, and the obvious absence of any prejudice, we liberally construe the original notice of appeal to encompass Cassandra Ndiforchu in her personal capacity as well as in her listed role of co-trustee of her family trust. (See, e.g., *Beltram*, at pp. 714-716 [where issues on appeal are identical as to city and city employee, inadvertent omission of employee’s name from notice of appeal did not prejudice or mislead respondents]; *Boynton v. McKales* (1956) 139 Cal.App.2d 777, 787-788 [where two defendants moved for new trial, notice of appeal was understood to be an appeal of the minute order that granted both motions even though notice referred to only one defendant’s motion].)

II. Simpson’s Standing

Cameric contends that all the evidence presented at trial established that the damages alleged were suffered by Plaza Sports Medical Group (Plaza), the business entity within which Simpson practices medicine. Cameric notes that there was evidence

that Plaza was a corporation; accordingly, Cameric claims that as a matter of law, Plaza was the only entity that could sue for damages and that Simpson had no standing to sue. We reject this argument.

Although Cameric characterizes this issue as involving the application of law to “undisputed facts,” and thus subject to de novo review, the evidence of Plaza’s legal status was in conflict. (*Canister v. Emergency Ambulance Service* (2008) 160 Cal.App.4th 388, 394 [“When the evidence is not in conflict, we are presented with a question of law and are not bound by the findings of the trial court,” but when a conflict exists in the evidence, the substantial evidence standard applies].) Simpson, on whose testimony Cameric relies to demonstrate that Plaza was a corporation provided differing accounts. Simpson first testified that Plaza was a fictitious business name, “a D.B.A.,” under which he practiced medicine; then, moments later, he called it a corporation. Other evidence reflected the confusion: the lease at issue listed that the lessee as “William Simpson, MD Doing business under the name of W.B. Simpson, MD, Inc.” Even assuming, arguendo, that Cameric is correct that Simpson would lack standing to sue if Plaza was incorporated and that Cameric is not now estopped from raising that issue, there was substantial evidence from which the jury could have concluded that Plaza was a fictitious business name under which Simpson did business. Accordingly, Cameric has not established as a matter of law that Simpson lacked standing to sue.

III. Sufficiency of the Evidence of Damages

“Damages awarded to an injured party for breach of contract ‘seek to approximate the agreed-upon performance.’ [Citation.] The goal is to put the plaintiff ‘in as good a position as he or she would have occupied’ if the defendant had not breached the contract. [Citation.]” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District* (2004) 34 Cal.4th 960, 967.) Cameric argues that the damages award cannot stand because Simpson failed to provide evidence of his net profits, solely providing evidence of his accounts receivable during the time for which he claimed past

damages. Cameric contends that the only evidence of damages presented at trial was of Plaza's billings, not of the medical practice's lost profits.

We review the jury's damages findings for substantial evidence. "We look at the evidence in support of the successful party, disregarding any contrary showing, and we resolve all conflicts in favor of the respondent, indulging in all legitimate and reasonable inferences to uphold the verdict if possible. [Citation.] When two or more inferences can reasonably be deduced from the facts, we do not substitute our deductions for those of the finder of fact. [Citation.] We must affirm if substantial evidence supports the trier of fact's determination, even if other substantial evidence would have supported a different result. [Citation]." (*Canister v. Emergency Ambulance Service, supra*, 160 Cal.App.4th at p. 394.) We conclude that the evidence was sufficient to support the damages award.

Simpson testified generally to the manner in which he was damaged by Cameric's conduct. When Cameric discontinued power to his office suite, he no longer had operational lights, telephones, or computers, greatly diminishing his ability to practice medicine and to perform additional medical-legal engagements. Prior to the outage, Simpson saw approximately 60 to 70 patients on Thursdays, his busiest day of the week for patient visits. Simpson estimated that, during the power outage, he was down to 8 to 10 patients on Thursdays. Simpson testified that he lost patients and business because he could not be contacted and because he could not perform his usual work. Moreover, Simpson testified that his patient load had never returned to its pre-outage levels. Cameric also ceased providing cleaning services, resulting in additional cleaning costs being borne by Simpson.

This account was corroborated by computer consultant Anja Wilson, who serviced Simpson's computers and performed office work. Wilson observed that when he was in the office on Thursdays before the power was cut, approximately 68-70 patients would come in for office visits. On the first Thursday without power, only five or six patients came in, the other appointments having been cancelled by Simpson's staff. Wilson described patient flow having "decreased quite a bit" during the power outage: he estimated that the number of patients seen during that time dropped by 80 to 85 percent.

Simpson also provided evidence of his financial damages. He introduced into evidence ledgers of patient visits in January 2005 and January 2006, showing that in January of 2005 he saw 258 patients and billed \$117,445, while in January 2006, he saw 54 patients and billed \$7,830. This represented a difference of \$109,615 between January 2005 and January 2006. Simpson testified that he made the same comparison for February 2006, arriving at a loss of \$107,422 for that month, and for March 2006, a loss of \$105,230. Simpson noted that the amount of the loss decreased as time went on, because the power was back on, some patients had returned, and he had begun to acquire new patients. Nonetheless, Simpson testified, his practice had not fully rebounded, and he reported losses (calculated by comparing each month in 2005 with that month in 2006) of \$103,038 in April 2006; \$100,845 in May 2006; \$98,653 in June 2006; \$96,461 in July 2006; \$94,268 in August 2006; \$92,076 in September 2006; \$89,884 in October 2006; and \$89,692 in November 2006. Simpson claimed no damages after the month of November 2006 because he moved his practice to another location in December 2006. These damages added up to \$1,085,184. Simpson testified that these billed amounts were amounts owed not by patients personally but by insurance companies, personal injury lawyers, Medicare, and private insurance.

Simpson also reported other damage to his practice's income. He explained that he could no longer do as many depositions, going from an average of three or four per month to only one in January, although he did not quantify any alleged lost deposition damages. He had to pay for cleaning services to his suite when Cameric ceased providing them, amounting to \$5,500. Simpson's total asserted past damages were \$1,090,684, representing the lost income from January to November 2006, plus \$5,500 for cleaning services, and this was the amount of the jury's award for past damages.

CamERIC argues, however, that this evidence established merely gross revenues, if it even established that, and that there was no evidence as to Simpson's overhead. While fixed and overhead costs are not generally recoverable (*Burnett & Doty Development Company v. Phillips* (1978) 84 Cal.App.3d 384, 392), there is no indication that the measure of damages here—monthly revenues lost as a result of the breach of contract,

determined by comparing monthly revenues before and after the breach—improperly incorporates any recovery of overhead expenses. Simpson did not seek to recover *all* the revenue of the practice for any month, a request that would implicate questions of overhead expense recovery, but instead asserted that the differential between the monthly revenues of 2005 and 2006 constituted his damages.¹ While Cameric argues that the evidence that these damages were actually suffered was speculative, the evidence presented was sufficient for a reasonable jury to conclude that the revenues in question would eventually have been received by the medical practice and that they were therefore actually-suffered damages proximately caused by Cameric’s breach of the lease.

IV. New Trial Motion

Camic contends that the trial court abused its discretion when it denied Cameric’s motion for a new trial on the grounds of newly discovered evidence and surprise. “Generally, the trial court’s ruling on a new trial motion is reviewed for an abuse of discretion. [Citation.] To the extent that the trial court confronted conflicting declarations in denying the new trial motion, we affirm the trial court’s factual determinations, whether express or implied, if supported by substantial evidence. [Citations.] Nonetheless, ‘it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party . . . including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.’ [Citation.]” (*Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1176, fn. 6; see also *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.)

¹ Although overhead expenses were not specifically addressed at trial, the use of a comparison between revenues prior to and after the breach of contract essentially omits overhead in both instances.

A. Newly Discovered Evidence

A new trial may be granted on the basis of newly discovered evidence that is material for the party seeking the new trial and that the party could not, with reasonable diligence, have discovered and produced at trial. (Code Civ. Proc., § 657, subd. 4; *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) Here, the evidence Cameric claims to be newly discovered are documents filed by Simpson in bankruptcy and family court: a 2003 bankruptcy filing and tax returns for the period 1996 to 2002.

We find no abuse of discretion here. A party making a motion for a new trial on newly discovered evidence grounds “has the burden to prove that he exercised reasonable diligence to discover and produce the evidence at trial. If he does not make this showing, the motion must be denied. Moreover, a general averment of diligence is insufficient. The moving party must state the particular acts or circumstances which establish diligence.” (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 153-154.) Neither in the trial court nor on appeal has Cameric offered any cogent explanation for why these court filings could not have been obtained earlier with the exercise of reasonable diligence.

In the documents submitted to the trial court with Cameric’s motion for a new trial, Cameric failed to make any showing that it could not have, with reasonable diligence, obtained these documents before trial. On appeal, all Cameric did was to make the conclusory assertion that “[i]t was only upon conclusion of trial, defendants were able to obtain” the bankruptcy filing. Cameric clearly knew long before trial that Simpson had declared bankruptcy, as it requested during discovery that he produce documents generated as a result of “your bankruptcy filing.” Although Cameric made a passing reference in its trial court briefing, not supported by any evidence in a declaration, to the receipt of Simpson’s social security number after trial, Cameric has not shown that it could not have obtained Simpson’s bankruptcy documents well before trial had it chosen to do so.

As to the tax returns, Cameric now explains that they were discovered by Cameric because they were submitted in support of Simpson's motion to set aside a default judgment for child support. But nowhere in the briefing or record on appeal has Cameric offered any explanation for why it could not have discovered this filing, and the attached tax returns, before trial. Moreover, Cameric certainly did not exercise diligence in obtaining these documents, for Cameric has not demonstrated that it specifically sought Simpson's tax returns from 1996 to 2002 during discovery. While Cameric claims to have sought the documents in discovery and provides a citation to its Request for Production, Set Two, that document does not appear to have called for these tax returns. In the request for production, Cameric sought 10 categories of documents: documents "which support your claim for loss of earnings," documents "generated as a result of your bankruptcy filing," documents "documenting any financial losses" suffered as a result of defendants' actions, documents "which support any of your claims in this action," correspondence between the parties; documents in Simpson's possession that were generated by Cameric; writings concerning investigations conducted by Simpson; documents reflecting Cameric's reasons for filing suit; documents that support Simpson's request for punitive damages; and writings concerning Cameric. Tax returns for the period 1996 through 2002 would not appear to be responsive to any of these requests for production because the lease in question here began in 2004 and the breach of contract occurred in 2006.

Camic next relies on its February 5, 2007 notice to Simpson to attend trial and to produce documents as evidence of his diligence. That notice did not request the 2003 bankruptcy filings. Cameric did request that Simpson produce state and federal tax returns—but only for the three previous years. Tax returns for 1996 through 2002 were not responsive to these requests, nor do they appear to have been called for by any other requests in the notice because they predate the lease and the breach by several years. The fact that the tax returns significantly predate the events at issue here, of course, also raises questions concerning their materiality. In light of Cameric's failure to show that the evidence could not have been discovered earlier through the exercise of reasonable

diligence, the trial court did not abuse its discretion in denying the motion for new trial on this ground.

B. Surprise

Cameric also based its new trial motion on “[a]ccident or surprise, which ordinary prudence could not have guarded against.” (Code Civ. Proc., § 657, subd. 3.) To secure a new trial on this ground, the moving party must demonstrate that he was placed unexpectedly in a situation to his detriment, where he is guilty of no default or negligence. (*Wade v. De Bernardi* (1970) 4 Cal.App.3d 967, 971.) In his motion for new trial, Cameric claimed that the surprise was that Simpson withheld material evidence in the form of his 2003 bankruptcy filings. This argument fails for the same reason that the newly discovered evidence claim does: Cameric has not shown it could not have discovered these court filings long before trial if it had exercised reasonable diligence. During discovery Cameric knew that Simpson had declared bankruptcy, but when Simpson did not produce documents pertaining to the bankruptcy proceeding Cameric chose not to pursue those documents further, either by continuing efforts to compel Simpson to produce them or by obtaining them from the court in which they were filed. Cameric has not demonstrated that there was any reason it could not have done so. As Cameric has not shown that “ordinary prudence on the part of the person claiming surprise could not have guarded against and prevented it” (*ibid.*), the trial court did not abuse its discretion in denying a new trial on the ground of surprise.

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.